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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. .....

UNITED MINE WORKERS OF AMERICA,
Petitioner,

v.

CHESTER RAILING AND PAUL RAILING,
d/b/a C & P COAL COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner United Mine Workers of America prays that a Writ of Certiorari issue to review (1) the Judgment of the United States Court of Appeals for the Fourth Circuit entered July 17, 1970 in Case No. 12,723, styled *Chester Railing and Paul Railing, d/b/a C & P Coal Company, Plaintiffs-Appellants* v. *United Mine Workers of America, Defendant-Appellee,*[1] wherein the Fourth Circuit, *in conflict with the rule that, absent a specific federal statute of limitations, national labor policy demands application of a state statute,* held that in an

[1]Herein the United States Court of Appeals for the Fourth Circuit is called *"Fourth Circuit"*; the United States District Court for the Northern District of West Virginia, at Fairmont, *"trial court"* or *"district court"*; United Mine Workers of America, *"UMW"*; Chester Railing and Paul Railing, *"Railing"*.

action under Section 303, Labor Management Relations Act, 1947, as amended (29 USCA 187, called "Act"), "the rule most appropriate is that the cause of action accrues on the last date of continuing illegal conduct for purposes of application of a state statute of limitations, but that for separate injury for which damages are earlier ascertainable suit *may* be brought at the date of ascertainment" (A. 39a),[2] reversing [3] the judgment of the United States District Court for the Northern District of West Virginia, at Fairmont, which held that any grievance committed or damage sustained more than two years prior to the institution of the instant action is barred by West Virginia Code, Chapter 55, Article 2, Section 12 (A. 23a), and (2) the Fourth Circuit's order entered September 8, 1970, denying UMW's petition for rehearing en banc (A. 47a).

A certified record in said case, together with proceedings in the Fourth Circuit, is furnished herewith, in accordance with the Rules of this Court.

OPINIONS BELOW

The district court's opinion appears in Appendix A hereto (A. 1-24a) and in the certified record, and is reported in 276 F.Supp. 238. The Fourth Circuit's majority and dissenting opinions appear in Appendix B hereto (A. 33-45a) and in the certified record, and are reported in 429 F.2d 780.

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[2]Emphasis of the word "*may*" appears in the majority opinion (A. 39a). Unless indicated, all emphases herein are supplied.

The abbreviation "R. ___" refers to the certified record filed in this Court's Clerk's office. The symbol "R.", followed by the numeral "I" and a page number, refers to Volume I, and the indicated page therein, of the certified record. The symbol "R. 19", followed by a page reference in parentheses, refers to a volume of depositions marked in the certified record with the numeral "19". The abbreviation "A. ___" refers to pages in the appendices to this Petition.

[3]The reversal was based upon an opinion by a majority of a Court panel (Circuit Judges Craven and Butzner, with Circuit Judge Boreman dissenting).

JURISDICTION

The judgment of the Fourth Circuit was entered on July 17, 1970. A timely petition for rehearing en banc was denied on September 8, 1970 (A. 47a), and this Petition for Certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USCA 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. In an action for damages to business and property based upon Section 303 of the Labor Management Relations Act, 1947, as amended, and for compensatory and punitive damages for a common law tort based upon pendent jurisdiction, wherein it is alleged that primary picketing to achieve a collective bargaining contract included union activities in violation of the named federal statute which contained no limitation for instituting the federally-created right of action, was it reversible error for the federal court of appeals (a) to interpret and apply a state statute of limitations contrary to that placed thereon by the state's appellate court, and (b) to hold under applicable law and undisputed facts that the cause of action accrued on the last date of alleged continuing illegal conduct and an alleged injured party was not required to sue until all illegal activity ceased, in contrast to the district court's holding that the limitations statute accrued and began to run on each day's damage as it occurred?

2. Under applicable law and the undisputed facts, was the court of appeals warranted in reversing the district court and remanding the action for further proceedings and in failing and refusing to affirm the district court's granting of defendant's motion for summary judgment as to the issue relating to the two-year statute of limitations?

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

Statutory provisions involved are Sections 301 and 303 of the Labor Management Relations Act, 1947, as amended (29 USCA 185, 187); 28 USCA 1652; and West Virginia Code, 1931, as amended, Chapter 55, Article 2, Section 12; as well as Rule 15(d) and Rule 56, Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

A. Kind of Action

Asserting district court jurisdiction[4] to be premised upon the Act's Section 303, *in a complaint filed on June 28, 1961,* Railing sought recovery from UMW of dam*ages*[5] allegedly caused their business and property in Taylor, Barbour and Harrison Counties, West Virginia *during the period beginning in April, 1958 and continuing through July 14, 1959* (A. 1-2a, 28-29a), under the named statute by reason of alleged secondary boycott activities, and compensatory and punitive damages under the doctrine of pendent jurisdiction on the theory that a common-law tort was committed against them (A. 29-32a).

B. UMW Pleads the West Virginia Statute of Limitations and, in a Summary Judgment Motion, Asserts that Railing's Claims Are Barred Thereby

In addition to motions to dismiss the action and complaint for failure to state a claim (R. I, 10), and other

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[4]Originally instituted in the United States District Court for the Eastern District of Kentucky, on UMW's motion, the case was transferred to the United States District Court for the Northern District of West Virginia, at Fairmont, on March 29, 1962 (A. 2-3a).

[5]Railing seeks to recover $1,000,000.00 as damages to their business and loss of profits therefrom; $100,000.00 for damage to property, machinery and equipment; $20,000.00 for sums expended preparing to resume business operations; $300,000.00 for punitive damages; and costs (R. I, 2, 6). Railing's claim for punitive damages as to the federal claim under the Act's Section 303 was rejected by the district court (A. 23-24a, 32a).

motions not involved in this appeal, UMW's answers denied the complaint's material allegations and asserted the action to be barred by the two-year limitations in West Virginia Code, 1931, as amended, Chapter 55, Article 2, Section 12 (A. 1-2a; R. I, 134).[6]

In a summary judgment motion, UMW asserted that the pleadings, depositions, answers to the interrogatories propounded to Railing by UMW, and affidavits show, as a matter of law, that Railing's claims are barred by the West Virginia statute of limitations.

C. The Facts

In depositions, Chester Railing related he and his brother, Paul Railing, operated, as partners, a coal stripping operation and tipple at Berry Run, above Flemington, West Virginia (A. 11a, 33a). Approximately five miles separate the two operations (A. 13a).

Railing operated on a non-union basis; and in the spring of 1958 their employees (numbering approximately 20 to 25 at the strip pit and about 7 or 8 at the tipple went on strike (A. 13a). Employees of UMW's District 31 (Eli Zivkovich, Harry Myers, Joe Gladski and Russell Mayles) met with Chester Railing to negotiate a UMW contract for their employees. Picketing occurred on what is known as Buck Run Road (A. 14a) "in a wide place in the road". All of Railing's employees quit work when the strike started and did not return until after the strike was over in July, 1959 (A. 14-15a).

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[6] Amendments relied upon are Chapter 2, Acts of the West Virginia Legislature, Regular Session, 1949 (Michie's West Virginia Code, 1955, Chapter 55, Article 2, Section 12, Serial Section 5404) and Chapter 2, Acts of the West Virginia Legislature, Regular Session, 1959 (Michie's West Virginia Code, Chapter 55, Article 2, Section 12). These amendments appear in Appendix C hereto.

Other pertinent statutory provisions, not quoted in the Petition, (*ante*, p. 4) also appear in Appendix C.

When Chester Railing was asked how employees were induced and encouraged to refuse to work, process, receive or otherwise work on Railing's coal, he responded, "Just by that picket line" and "They formed a picket line and I couldn't get through it". Further inquiry of Chester Railing, "Do you have any other way that they induced or encouraged your employees not to work?", brought the response, "No" [R. 19(35)].

While Railing, responding to interrogatories propounded by UMW, lists a number of "other employers that plaintiffs were forced to cease doing business with", the response is signed originally by one of Railing's attorneys and thereafter adopted by Railing (R. I, 133). On the other hand, Chester Railing admits that no union representative ever asked him not to let Kinty or Kittle Trucking haul his coal or that he was to hire some other coal trucking company; and he admitted the only thing that union representatives asked of him was to sign the UMW contract; and they never discussed any other coal company [R. 19(73)]. Similarly, Paul Railing related that no union representative or official ever asked him not to do business with any other trucking company or any other person [R. 19(97)].

Chester Railing admits the picket line "was to have your employees not to work to get you to sign this United Mine Workers Contract". Asked, "Didn't they have that picket line there for some other reason?", Chester Railing's answer was, "Not that I know of. It seemed to be a gathering point for them" [R. 19(35-36)].

While Railing claimed that picketing of their business first began on April 3, 1958 and "an all out offensive" occurred on April 10, 1958 and continued uninterrupted until July 14, 1959, the Railing operation had an

exclusive sales contract with Pursglove Coal Company which would not disclose to Railing the names of its customers and whose procedure, according to Chester Railing, was for Pursglove to sell the coal and then obtain it from various coal producers. Railing conceded he did not know whether Pursglove's contract with coal purchasers provided the coal was to be furnished by Railing, admitting also that Pursglove probably sold coal produced by other producers. In response to an inquiry as to "How did you know what to produce?", Chester Railing replied, "They called and told me". While Chester Railing first stated this was done monthly, he later recited that Railing "got orders every morning" and "I never got no monthly", adding that Pursglove would call him every morning, inquire " 'Well, how many cars are you going to get today?' or 'How many cars have you got?' " and upon being advised as to the number and that Railing planned to load them, Pursglove would then "give me a billing to ship so many here and so many there". On these *daily* occasions, since Railing had no contract with Pursglove for a certain price, according to Chester Railing, he and Pursglove "would always keep haggling about the price" (A. 44a) with Railing asking " 'Can't you get the price up?' ". Railing's testimony is that losses due to the work stoppage occurred daily (A. 45a). Asked, "Then you are saying your losses due to this stoppage of work *occurred daily* from the day the strike started?", Chester Railing replied *"They would go from day to day,* I imagine," admitting this was so because of the way the Railing operation shipped and sold its coal.

Moreover, Chester Railing claimed that on November 16, 1958, two P & H shovels were destroyed by an ex-

plosion (A. 45a) and that on July 9, 1959 another shovel (an 87 Lorraine) was dynamited (A. 45a).[7]

D. The District Court's Judgment and Opinion

Under the Act's Section 303 (29 USCA 187), subsection (b) provides that "Whosoever shall be injured in his business or property by reason of any violation of subsection (a) . . . may sue therefor . . . and shall recover the damages by him sustained and the cost of the suit".

The instant action, initially instituted in a federal district court in Kentucky, was transferred to a federal district court in West Virginia, which declared it "must look to the statutes of . . . West Virginia (the state in which the cause of action arose) to determine whether or not the plaintiffs have brought their action within the time allotted" (A. 5a)

There is agreement the applicable West Virginia limitations statute is West Virginia Code, Chapter 55, Article 2, Section 12, which provides, in part, that "Every personal action for which no limitation is otherwise prescribed shall be brought: (a) *Within two years next after the right to bring the same shall have accrued, if it be for damage to property*".

The district court regarded as crucial "the date upon which plaintiffs' cause of action 'accrued'—the date upon which the applicable statute of limitations" began (A. 5a). It observed no federal cases were determinative of the Act's Section 303 and found itself "faced with the necessity of fashioning 'from the policy of our national labor laws' a rule of decision to be applied in determining the time within which the liability created

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[7]The foregoing factual recitals not otherwise supported by page references, are to be found in R. 19 (57, 58, 63, 65).

by" Section 303 "accrues" (A. 5-6a). Noting the instant case involved numerous acts in a continuous invasion of a protected interest and that, with respect to tortious conduct, a cause of action generally accrues when wrongful conduct produces an invasion of property rights of another, the district court believed the most appropriate rule in a Section 303 action for damages to a plaintiff's business or property is that the statute begins to run when the cause of action arises, and a cause arises *when damage occurs.* It supported its conclusion by *Delta Theaters, Inc.* v. *Paramount Pictures, Inc.*, DC, E.D. La., 1958, 158 F.Supp. 644, 649, which, though recognizing "conceptual difficulties in attempting to split this type of claim", adopted the Third Circuit's rule in *Bluefields S. S. Co.* v. *United Fruit Co.*, 3 Cir., 243 F. 1 (1917), and reads thus:

> " 'The statute began to run when the cause of action arose, *and the cause of action arose when the damage ooccurred.* Then action might have been brought' "

and, further,

> "In the case of successive damages suffered day by day . . . the statute begins to run on each day's damage as it occurs. When suit is brought, the plaintiff may recover only for damages inflicted during the period of limitations immediately preceding the filing of the complaint."[5]

While *Paramount Pictures* involved a cause of action based upon a conspiracy violative of the Clayton Act's

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[5]The district court appropriately cited *Highland Supply Corporation* v. *Reynolds Metals Company*, 8 Cir., 327 F.2d 725 (1964); *Streiffer* v. *Seafarers Sea Chest Corporation*, DC, E.D. La., 1958, 162 F.Supp. 602 and *Radio Corporation of America* v. *Rauland Corporation*, DC, N.D. Ill., 1956, 186 F.Supp. 704.

Section 4 (15 USCA 15),[9] the district court regarded that analysis "particularly appropriate in an action based on Section 303 of the Act for damages to a plaintiff's 'business or property' " since, as the district court professed (A. 8a), "determining the actual cause, and the date thereof, of a particular loss for the purpose of establishing the accrual date of a cause of action would normally be impossible except in simple cases where the 'acts are individually related to, and more or less contemporaneous with, the resulting damage.' "

The district court sustained UMW's summary judgment motion as it pertained to the statute of limitations issue, holding any grievance committed or damage sustained more than two years prior to the instant action's institution on June 28, 1961 barred by West Virginia Code 55-2-12 (A. 24a).[10]

E. The District Court's Judgment and Opinion Accord with West Virginia Decisional Law That an Action Accrues When Damage Occurs.

Since the phrase "shall have accrued" is in the West Virginia statute of limitations, accrual of a cause of action under West Virginia decisional law becomes a pertinent inquiry.

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[9]15 USCA 15 reads:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

[10]The district court denied summary judgment as to the issue of unlawful and wrongful inducement of Railing's employees, and of such inducement of employees of other employers, and such inducement of other employers, finding and concluding that UMW failed to carry its burden of showing a lack of any genuine issue of material fact with respect thereto. The Fourth Circuit on September 3, ,1968 refused UMW's Application for an Order Permitting an Appeal under 28 U.S.C. Section 1292(b). The district court's opinion is reported in 276 F. Supp. 238.

As early as *Pickens* v. *Coal River Boom Company*, 66 W.Va. 10, 65 S.E. 865 (1909), the West Virginia Supreme Court held that (Syllabus Point 3):

> "When the operation of a boom causes deposit of sand in a stream thereby injuring the grinding capacity of a mill, the mill owner *may recover in actions from time to time as damage and loss occur*, and is not compelled to sue for present and prospective damage in one suit, and the statute of limitations begins to run, not from the construction of the boom, but when the damage occurs in time."

Implementation of *Pickens* came in *Guyan Motors, Inc.* v. *Williams*, 133 W.Va. 630, 634, 57 S.E.2d 529, where the West Virginia court recognized that a right of action accrues to a land owner deprived of a lateral support, *when damage results from a defendant's act, and not when the act takes place*, if that act does not then damage the land in question. Congruent therewith is *Harrison* v. *McOwen*, 126 W.Va. 933, 938, 30 S.E.2d 740, where the West Virginia court, recognizing the validity of its rule in *Pickens*, stated "it is perfectly clear that the result of the alleged acts of the defendant did not happen at the actual time of the blast, but . . . when the alleged slide took place. *Then the plaintiff owned this land alleged to have been damaged.*" Citing West Virginia Code, 55-2-12, the West Virginia court, in *Hundley* v. *Martinez*, 158 S.E.2d 159, 164 (W. Va., 1967), which involved a *tort* action, declared that "Ordinarily the right to bring an action for personal injuries accrues when the injury is inflicted".

F. The Fourth Circuit's Judgment and Majority and Dissenting Opinions

Disagreeing with the district court and West Virginia decisional law, the Fourth Circuit reversed the district court, remanded the case, denied rehearing (A. 46-47a)

and in its majority opinion held "the rule most appropriate is that the cause of action accrues on the last date of continuing illegal conduct for purposes of application of a state statute of limitations, but that for separate injury for which damages are earlier ascertainable suit may be brought at the date of ascertainment" and "Under this rule the West Virginia statute of limitations did not begin to run until the UMW finally ceased its illegal strike activities" (A. 39a, 40a).

In dissent, Circuit Judge Boreman notes the phrase "shall have accrued" to be critical in West Virginia's statute of limitations, regards accrual of a cause of action a pertinent inquiry (A. 43a), points to West Virginia's decisional law (A. 44a; *ante,* p. 11), avows disagreement "as to the majority's interpretation and application of the West Virginia statute of limitations" (A. 40a), and calls for affirmance of "that portion of the judgment below which relates to and applies the two-year statute of limitations (A. 45a).

Whereas the majority opinion, rejecting the "day-to-day accrual principle" as inapposite and rationalizing the instant action to be one of tort and supporting its conclusion by quoting from 54 C.J.S., *Limitations of Actions,* §169, at p. 128 (A. 39a),[11] the dissent observes the majority opinion's failure to note the text's further language:

> "Where a continuing tort involves separate and successive injuries, the action accrues at, and limitation begin to run as to each injury from, the date thereof, and *there is not only a cause of action for the original wrong, arising when the wrong*

[11] The text noted above reads:

> "If the continuing nature of the tort and injury is such that damages cannot be determined until cessation of the wrong, the right of action is deemed as continuous as the tort on which it is based so that it accrues at, and limitations begin to run from, the last date rather than from the first date of the wrong, or, as otherwise expressed, limitations do not apply to such a tort so long as it subsists."

> *is committed, but separate and successive causes of action for the consequential damages arise as and when such damages are from time to time sustained;* and, therefore, as long as the cause of the injury exists and the damages continue to occur, plaintiff is not barred of a recovery for such damages as have accrued within the statutory period before the action. Thus an action may lie for an injury recurring within the prescriptive period, even though the first tortious act antedated such period, and a cause of action based solely on the original wrong may be barred; but the recovery is limited to such damages as accrued within the statutory period before the action" [Emphasis is that of the dissenting opinion].

The dissent also notes (A. 44-45a) that UMW's motion for summary judgment was bottomed upon the complaint, pleadings, interrogatories propounded by UMW to Railing and Railing's responses thereto, and undisputed Railing testimony (*ante*, pp. 5-8). The dissent disputes the majority opinion's rejection of "a day-to-day accrual principle" (A. 39a) by noting Railing's own *undisputed* evidence that "losses would go from day to day because of the way in which the plaintiff's operation shipped and sold its coal" (A. 44a). The conceded facts include also that Railing's claims for destruction and damage to equipment occurred on November 16, 1958 and July 9, 1959 (A. 45a). To the majority's argument that "It would require an unusual degree of prescience to determine when the strike would end and what damage would ultimately result" (A. 39a) and Railing's argument that the district court's ruling would require "an attempt at prophecy or projecting into the future how long the alleged illegal activities would continue",[12] the dissent, pointing to

[12]Quoted language is from Railing's brief in the Fourth Circuit, p. 6.

the conceded and undisputed facts upon which the district court premised its award of summary judgment on the limitations issue, declared "An instant remedy was available when a right of action accrued" (A. 45a).

REASONS FOR GRANTING THE WRIT

A. THE FOURTH CIRCUIT'S MAJORITY RULING ON THE STATUTE OF LIMITATIONS ISSUE CONFLICTS WITH PRIOR IMPORTANT DECISIONS OF THIS COURT AND THE FOURTH CIRCUIT.

Expressing *national labor policy*, this Court's *International Union, UAW* v. *Hoosier Cardinal Corp.*, 383 U.S. 696, 704-05, held that absent a specific federal statute of limitations, "the timeliness of suit under a federal statute is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations". The rule thus enunciated is consonant with Congress' command in 28 USCA 1652 that "The laws of the several states, except where the Constitution . . . or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply". Though *Hoosier Cardinal* concerned Section 301, the subject statute (the Act's Section 303) contains no limitations period for actions brought thereunder and nothing in *Hoosier Cardinal* indicates any rationale for applying a different yardstick to Section 303 actions.

While the Fourth Circuit's majority concedes the applicable limitations statute is West Virginia Code, 55-2-12, it nonetheless failed to accede to this Court's previously enunciated *Hoosier Cardinal* rule that federal courts are bound by state characterization of limitations statutes. Its holdings that "the victim of the illegal activity should be entitled to bring suit as soon as he

can do so, but should not be required to bring suit until the illegal activity has ceased" (A. 39-40a) and that "the West Virginia statute of limitations did not begin to run until the UMW finally ceased its illegal strike activities" (A. 40a), stand in sharp contrast, as Circuit Judge Boreman's dissent discusses (A. 40-45a), to the interpretation and application of the West Virginia statute by the West Virginia Supreme Court which declares that the right of action accrues "when the damage occurs in time".

It is obvious the Fourth Circuit's majority expresses its own preference of what the statute means. This Court has heretofore professed its preference not "to speculate at large upon the possible implications of bare statutory language" where a state's statute has been interpreted by the state's highest appellate court. *NAACP v. Button,* 371 U.S. 415, 432. Implementing *Button's* rule to the instant situation, where the West Virginia appellate court has declared that the right of action accrues "when the damage occurs in time", the words of West Virginia's "highest court are the words of the statute" and "binds us" (371 U.S. 432). Heretofore, too, the Fourth Circuit has declared itself "bound by the interpretation placed by the courts of West Virginia upon the statutes of that state". *Johnson* v. *Tucker,* 4 Cir., 249 F.2d 650 (1957); *State Farm Mut. Auto. Ins. Co.* v. *Drewry,* 4 Cir., 316 F.2d 716 (1963). The majority specifically ignores the Fourth Circuit's *Pickett* v. *Aglinsky,* 4 Cir., 110 F.2d 628 (1940) and *Weems* v. *Carter,* 4 Cir., 30 F.2d 202 (1929), which require that West Virginia's interpretation of its limitations statute be followed.

Thus, the majority's disparate interpretation from that of the West Virginia appellate court demonstrates

its collision with *Hoosier Cardinal's* command and rationale to follow West Virginia law, as well as the other authorities noted herein. If the Fourth Circuit's majority rule and rationale are permitted to stand and federal courts are permitted to express their own preferences of what state statutes mean, then the rule of *Hoosier Cardinal* is rendered meaningless.

The importance of this issue warrants issuance of the writ sought herein.

B. THE MAJORITY'S INTERPRETATION CONFLICTS, NOT ONLY WITH WEST VIRGINIA'S DECISIONAL LAW, BUT ALSO WITH THE RATIONALE OF DECISIONS OF THE THIRD, FIFTH, SIXTH AND EIGHTH CIRCUITS, AND IS ERRONEOUS.

Just as the Fourth Circuit's majority rule conflicts with West Virginia cases (*ante*, p. 11) which hold a plaintiff "*may recover in actions from time to time as damage and loss occur . . . and the statute of limitations begins to run . . . when the damage occurs in time*", so in *Bluefields S.S. Co. v. United Fruit Co.*, 3 Cir., 243 F. 1 (1917), upon which *Delta Theaters, Inc.* v. *Paramount Pictures, Inc.*, DC, E.D. La., 1958, 158 Supp. 644, 649, was premised, the Third Circuit proclaimed, "The statute began to run when the cause of action arose, *and the cause of action arose when the damage occurred*". Consonancy between *Delta* and *Bluefields S.S. Co.* with the West Virginia rule is thus obvious and manifests the propriety of the district court's holding and the error of the majority in rejecting the district court's holding and judgment.

The majority opinion (A. 36a, fn. 4), noting Railing's contention that a cause of action should not be held to accrue and the limitation period should not commence to run until cessation of the actions complained

of, quotes from *Crummer Co.* v. *Du Pont*, 5 Cir., 223 F.2d 238, 247, that a cause of action does not accrue until "the wicked cease from troubling and the weary are at rest"; *but on the issue of the action's accrual, the Fifth Circuit rejected the appellant's contention, adopted appellees' view and held* (p. 247):

> "The theory of the district court and of the appellees . . . is that a cause of action accrues upon, and limitation commences to run from, the doing of the first wrongful act with resulting damages",

and

> *"Thus, while successive claims would arise out of successive unlawful acts and consequent damages, such claims would have to do and be concerned with only such successive occurrences and the damages and injuries caused by such acts, and such occurrences would not extend the period of limitation as to earlier acts done and injuries caused thereby."*

Similarly, in the Sixth Circuit's *Barnett* v. *L & N Railroad Co.*, 407 F.2d 1333 (1969), answering whether a cause of action had been brought "within one year of the occurrence giving rise to the action", wherein the court rejected appellant's attempt to avoid the statute's consequences by evidence that as a result of the slander alleged he was continuously denied employment and that the wrong done to him was thus continuous, holding (p. 1333):

> "This contention fails to recognize . . . it is the occurrence of the tort which marks the beginning of the running of the statute of limitations, and that the date or dates of consequential injuries is therefore immaterial."

The majority opinion's specific holding that "application of a day-to-day accrual principle is inapposite",

invites the Court's attention to the Eighth Circuit's contrary holding in *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F.2d 725, 732, that where a private cause of action under the antitrust law is based upon a continuous invasion of one's right, *his cause of action accrues from day to day* as his rights are invaded to his damage.

C. THE MAJORITY'S HOLDING IS OPPOSED BY GENERAL RULES OF LIMITATIONS FOR TORTS AND IS NOT SUPPORTED BY ITS CITED AUTHORITIES.

The majority opinion, in disagreement with the district court's reliance upon antitrust cases, declared that "Since this is a tort case it seems . . . more sensible to refer to rules of limitations for torts than for antitrust" (A. 39a) and quoted from 54 C.J.S., *Limitations of Actions*, §169, at p. 128 (1948). Circuit Judge Boreman's dissent demonstrated the majority's rule (that the statute of limitations did not begin to run until UMW finally ceased its illegal strike activities) failed to note the concluding portion of 54 C.J.S., *Limitations of Actions*, §169, at p. 128 (*ante*, p. 12). The dissent's validity is emphasized particularly by the text's language that:

> *"Where a continuing tort involves separate and successive injuries, the action accrues at, and limitations begin to run as to each injury from, the date thereof, and there is not only a cause of action for the original wrong, arising when the wrong is committed, but separate and successive causes of action for the consequential damages are from time to time sustained."*

The majority's citations of *Urie* v. *Thompson*, 337 U.S. 163 (1949) and *Fowkes* v. *Pennsylvania R.R. Co.*, 3 Cir., 264 F.2d 397 (1959) dealing with the "time of discovery" rule have no application in a situation where, as herein, the element of concealment is totally lacking and where,

as the dissent states, Railing "knew of the losses almost immediately after they occurred" and conceded such losses occurred on a day-to-day basis (A. 45a). Nor is the majority's citation of *Reynolds Metals Co.* v. *Yturbide,* 9 Cir., 258 F.2d 321 (1958) relevant since, under *Hoosier Cardinal,* West Virginia law applies and in *Hundley* v. *Martinez,* 151 W.Va. 977, 158 S.E.2d 159 (1967), West Virginia's Supreme Court states its general rule to be: "Ordinarily the right to bring an action for personal injuries accrues *when the injury is inflicted*" and "In a malpractice case that generally would be from the time of the negligent act" (p. 164).

In *Ricciuti* v. *Voltarc Tubes, Inc.,* 2 Cir., 277 F.2d 809 (1960), plaintiff sued a neon tube manufacturer for disability caused by berryllosis allegedly contracted from use of the manufacturer's tubes. The statute of limitations began to run, declared the court, from the date on which the disease was diagnosed, unless the manufacturer could show the disease should, in the exercise of reasonable diligence, have been discovered earlier.

To the extent that *R. J. Reynolds Co.* v. *Hudson,* 5 Cir., 314 F.2d 776 (1963) holds that usually a claim for damage *ex delicto* runs from the day on which damage was sustained (p. 786), it supports the district court's holding and the dissent, and challenges the Fourth Circuit's majority rule. Both *Essex Wire Corp.* v. *M. H. Hilt Co.,* 7 Cir., 263 F.2d 599 and *Hilton* v. *Duke Power Co.,* 4 Cir., 254 F.2d 118 (1958), which dealt with Indiana and South Carolina statutes, respectively, would seem to accord with the West Virginia decisions; but, if contrary, the Fourth Circuit's *Rybolt* v. *Jarrett,* 112 F.2d 642 rejected determinations in other jurisdictions which conflict with West Virginia public policy.

D. THE MAJORITY'S HOLDING CONFLICTS WITH RAILING'S UNDISPUTED FACTUAL ADMISSIONS.

As noted (*ante*, p. 10), the district court granted UMW summary judgment as it pertained to the statute of limitations issue, based upon pleadings and facts recited (*ante*, pp. 5-8) and discussed, in part, in Circuit Judge Boreman's dissent (A. 44-45a). Noting the conceded fact that *Railing's* losses would go from day to day because of the way in which Railing's operation shipped and sold its coal, the dissent appropriately notes this testimony to be contrary to Railing's contention the alleged illegal activity resulted "in irrevocable loss of coal orders and contracts"; it aptly employs Railing's *day-to-day* testimony to rebut the majority's thesis that it would be impossible to compute damages on a day-to-day basis, as well as its criticism that the district court's decision requires of a prospective plaintiff "an attempt at prophecy or projecting into the future how long the alleged illegal activities would continue", asserting that *"An instant remedy was available when a right of action accrued"* (A. 45a). The dissent pertinently observes, too, the destruction of three pieces of mining machinery for which Railing seeks recovery, accurately notes that Railing "knew of the losses almost immediately after they occurred" and cogently responds "it would be senseless to hold that the statute of limitations did not begin to operate as to such losses until the unlawful activities had ceased" (A. 45a). The district court, having properly found and concluded there was no genuine issue of any material fact, correctly awarded UMW's summary judgment motion. *Tow* v. *Miners' Memorial Hospital Assn., Inc.*, 4 Cir., 305 F.2d 73.

The majority fails to deal with the undisputed facts and admissions, thereby demonstrating error in reaching its result and its fallacy in holdings that "it becomes clear that application of a day-to-day accrual principle is inapposite", that "Not only would the total damage have been unascertainable before the illegal strike ceased, but also adequate inclusion of all damages resulting from individual, day-to-day acts would have been difficult and cumbersome", as well as its further holding that "It would require an unusual degree of prescience to determine when the strike would end and what damage would ultimately result" (A. 39a).

E. THE MAJORITY HOLDING IGNORES RULE 15(d), FEDERAL RULES OF CIVIL PROCEDURE.

Rule 15(d), Federal Rules, which permits the filing of a supplemental pleading "setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented" emphasizes the majority's error.[13]

F. THE MAJORITY'S RESULT IS TO REQUIRE THE DISTRICT COURT UPON REMAND TO APPLY TWO DIFFERENT INTERPRETATIONS OF THE SAME LIMITATION STATUTE.

The dissenting opinion (A. 41a) realistically notes that in addition to the Section 303 claim, the second aspect "of the action seeks recovery of both compensatory and punitive damages for non-peaceful, violent,

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[13] Rule 15(d), Federal Rules of Civil Procedure, as amended, 1970, reads:

> "Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

coercive, and conspiratorial activities and conduct by the union of such a wilful and wanton nature as to give rise to a common-law tort". Moore's Federal Practice, 2d Ed., Vol. 2, p. 741 recites:

> "Where a state-created right is involved the state law will govern the determination of the applicable limitation period regardless of whether the action is legal or equitable."

Thus, should the majority's reversal stand, the result will be that, upon remand, the district court will be required to apply, as to the Section 303 aspect of the case, the rule that "the West Virginia statute of limitations did not begin to run until the UMW finally ceased its illegal strike activities" (A. 40a), whereas, as to the common-law aspect of the same case, the court will follow the rule as proclaimed by West Virginia cases (*ante*, p. 11).[14]

G. THE NEED FOR THIS COURT'S GUIDANCE IN PENDING CASES INVOLVING IDENTICAL CLAIMS IN EXCESS OF $2,300,000.00 EMPHASIZES THE IMPORTANCE OF THE WRIT'S ISSUANCE HEREIN.

Exclusive of the instant case, there are currently pending in the United States District Court for the Northern District of West Virginia (at Fairmont) 11 cases wherein coal producers seek damages against UMW in an amount exceeding $2,300,000.00, which are grounded in complaints either similar or identical with that in the instant case and all involving the same issues involved herein.[15]

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[14] In the Fourth Circuit, after entry of its majority and dissenting opinions and upon UMW's petition for rehearing en banc, Railing moved to amend the complaint, which the Fourth Circuit denied (A. 47a).

[15]

Style	Action No.	Amount
Cecil L. Kinty, d/b/a Kinty Trucking Company v. United Mine Workers of America	699-F	$ 155,000.00
Bertsel Kittle, dba Kittle Trucking Company v. United Mine Workers of America	700-F	78,500.00

(Footnote continued next page)

It can be expected that the district court will deem it compulsory to use the Fourth Circuit's majority opinion in the instant case as a guide.

Heretofore, certiorari has been awarded "because determination of the issue raised here will guide adjustment of a large body of similar claims now pending" (*Alcoa S.S. Co., Inc.* v. *U. S.*, 338 U.S. 421, 423), or because "the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification" (*Local 761, Int. Union, etc. Workers* v. *NLRB*, 366 U.S. 667, 671), or because of the "importance of the principal question" (*U. S.* v. *Standard Oil Co.*, 332 U.S. 301, 302).

The need for this Court's guidance in these cases should impel issuance of the Writ.

(Footnote continued from preceding page)

Style	Action No.	Amount
Chester Sinsel, d/b/a Sinsel Coal Company v. United Mine Workers of America	701-F	315,000.00
Thomas J. Gates, dba Dorothy Coal Company and Gates Trucking Company v. United Mine Workers of America	702-F	345,100.00
Green Valley Mining Company, Inc. v. United Mine Workers of America	703-F	422,500.00
Blue Ridge Coal Company, Inc. v. United Mine Workers of America	704-F	221,300.00
Lawrence Layman, d/b/a Layman Coal Company v. United Mine Workers of America	705-F	71,000.00
Louis Marra & Sam Marra, d/b/a Marra Brothers Coal Company v. United Mine Workers of America	706-F	260,000.00
Louis Marra, dba M & T Coal Company v. United Mine Workers of America	707-F	143,500.00
James W. Thompson, d/b/a Thompson Coal & Construction Co. v. United Mine Workers of America	708-F	170,000.00
Orlando Lacara, d/b/a P & J Coal Company v. United Mine Workers of America	709-F	165,800.00
Total		$2,347,700.00

CONCLUSION

For the reasons assigned, petitioner prays that the Writ of Certiorari should be granted and that the Writ issue to review the judgment, order and opinions of the Fourth Circuit entered in Case No. 12,723 as aforesaid. Petitioner intends to urge each of the questions presented, even if not specifically argued herein.

Respectfully submitted,

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December 7, 1970

APPENDICES

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

AT FAIRMONT

CHESTER RAILING AND PAUL RAILING,
d/b/a C & P COAL COMPANY,

Plaintiffs,

Vs.

Civil Action
No. 698-F

UNITED MINE WORKERS OF AMERICA,

Defendant.

October 28, 1967

CHRISTIE, DISTRICT JUDGE:

This matter is pending on the motion of defendant United Mine Workers of America for summary judgment. The complaint herein alleges injury to plaintiffs' business and property as a result of acts [in violation of Section 303 of the Labor-Management Relations Act of 1947 (29 U.S.C.A. 187)] on the part of officers, agents, representatives and members of the United Mine Workers of America. In conjunction with their federal claim, plaintiffs seek recovery of both compensatory and punitive damages for non-peaceful, violent, coercive and conspiratorial activities and conduct on the part of the union of such a wilful and wanton nature as to give rise to a common-law tort liability. This latter claim is asserted under the theory of pendent jurisdiction. The activity of which plaintiffs complain began in April of 1958 and

continued through July 14, 1959. Plaintiffs originally filed their complaint in this action on June 28, 1961.[1]

This motion for summary judgment is based on two grounds. First, it is contended that the pleadings, depositions, answers to interrogatories, and affidavits show, as a matter of law, that the plaintiffs' claims are barred by the West Virginia statute of limitations under West Virginia Code 55-2-12. Second, it is contended that the pleadings, depositions, and answers to interrogatories propounded by the defendant demonstrate, without dispute, that the activity complained of by the plaintiffs involved only "primary activity" as opposed to the "secondary activity" proscribed by Section 303 of the Act, and, therefore, defendant is entitled to judgment as a matter of law.

A determination of the issues presented by the defendant's motion for summary judgment requires, at the outset, a consideration of the question of the rules of law that are to be applied. This initial determination becomes necessary not only because of the factual situation presented, but also as a result of the procedural developments subsequent to the bringing of the action. The activity of which plaintiffs complained occurred in Taylor and Barbour Counties within the state of West Virginia. However, plaintiffs chose to institute this action in the United States District Court for the Eastern Dis-

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[1]Defendant contends in its brief submitted in support of the motion for summary judgment that "plaintiffs' action was not instituted until July 10, 1961," the date on which the defendant was served with the summons and complaint. However, under Rule 3 of the Federal Rules of Civil Procedure, an action is deemed commenced upon the filing of the complaint with the court and where, as in the present case, a federally created right is involved, the courts have uniformly held that, for the purposes of the tolling of a statute of limitations, an action is deemed commenced at the time the complaint is filed. 2 Moore, Federal Practice, Sec. 3.07 at 783 (2d Ed. 1966). See also *Jackson* v. *Duke*, 259 F.2d 3 (5th Cir. 1958); *Mohler* v. *Miller*, 235 F.2d 153 (6th Cir. 1956).

trict of Kentucky—a court in which they were able to obtain jurisdiction over the defendant as provided in 29 U.S.C.A. 187(b). Upon motion of the defendant, this action was transferred under 28 U.S.C.A. 1404(a) to this court for the convenience of the parties and witnesses and in the interest of justice. It is the effect of this transfer (with respect to the period of limitations to be applied to plaintiffs' claim under Section 303 of the Act) with which we are now concerned.

Applicable Statutes Of Limitations, Accrual of Cause of Action, and Commencement Of Running Of Statute

In actions at law in which a federally-created right is being enforced, in the absence of a controlling federal statute of limitations, the federal courts have resorted to the application of the statute of limitations of the state where the action was instituted. 2 Moore, Federal Practice, Sec. 3.07, at 747 (2nd Ed. 1966). This practice has been followed in the majority of the decisions concerned with an interpretation of Section 303, since Congress has failed to provide a statute limiting the time within which an action for damages may be brought. *United Mine Workers of America* v. *Meadow Creek Coal Co.*, 263 F.2d 52 (6th Cir. 1959); *International Union of Operating Engineers* v. *Fischbach & Moore, Inc.*, 350 F.2d 936 (9th Cir. 1965). Since, under these decisions, the statute of limitations to be applied to the plaintiffs' cause of action as originally instituted in the District Court for the Eastern District of Kentucky would have been the applicable Kentucky statute of limitations, the question arises as to the effect upon this determination of the subsequent transfer under Sec. 1404(a). Fortunately, in deciding this question, a valuable precedent is to be

found in *Van Dusen* v. *Barrack*, 376 U. S. 612 (1964), where the Supreme Court observed that,

> "Whenever the law of the transferee State significantly differs from that of the transferor State —whether that difference relates to capacity to sue, statutes of limitations, or 'substantive' rules of liability—it becomes necessary to consider what bearing a change of venue, if accompanied by a change in state law, would have on 'the interest of justice.' "

In resolving this potential conflict between the "interest of justice" requirement of Sec. 1404(a) and the possible application of different state laws upon a transfer under that section, the Court held that "in cases . . . where the defendants seek transfer, the transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue." Thus, the effect of a change of venue under Section 1404(a), with respect to the application of state law, is "but a change of courtrooms," and it, therefore, becomes necessary for this court to look to the law of the state of Kentucky, including any borrowing statutes, *Cope* v. *Anderson*, 331 U.S. 461 (1947), to determine the statute of limitations applicable to plaintiffs' cause of action.

Kentucky statutes of limitations provide a ten year period for actions upon which no other limitation is prescribed and a five year period for actions involving injury to real or personal property or to enforce liability created by a statute not fixing a different limitation period, KRS 413.060. However, the scope of these limitation provisions is narrowed by the "borrowing statute" which reads,

> "When a cause of action has arisen in another state or country, and by the laws of this state or

> country where the cause of action accrued the time for the commencement of an action thereon is limited to a shorter period of time than the period of limitation prescribed by the laws of this state for a like cause of action, then said action shall be barred in this state at the expiration of said shorter period." KRS 413.320.

In a recent interpretation of this statute, *Seat* v. *Eastern Greyhound Lines*, 389 S.W. 908 (1965), the Kentucky Court of Appeals held that where the period of time provided by the applicable statute in the foreign state in which the cause of action arose is shorter than that provided in Kentucky, then KRS 413.320 applies and the law of the foreign jurisdiction prevails. Although there is some question as to the construction to be given the West Virginia statute of limitations, nevertheless, the fact that it provides the shorter of the two periods of time is not questioned. Thus, we must look to the statutes of the state of West Virginia (the state in which the cause of action arose) to determine whether or not the plaintiffs have brought their action within the time alotted.

But before such a determination can be made, it becomes necessary to establish the date upon which plaintiffs' cause of action "accrued"—the date upon which the applicable statute of limitations would begin to run. The resolution of this question requires a search of the applicable federal law, *Rawlings* v. *Ray*, 312 U. S. 96 (1941), for while the state limitations period is controlling, the determination of the time of the accrual of a cause of action to enforce a federally-created right is a federal question. *Cope* v. *Anderson*, supra. An extensive search of the District, Circuit, and Supreme Court cases has failed to reveal any decision in which this particular

question, relating to "accrual" of a cause of action under Section 303 of the Act, has arisen. Therefore, for the purpose of the application of a statute of limitations, this Court is faced with the necessity of fashioning "from the policy of our national labor laws" a rule of decision to be applied in determining the time within which the liability created by Section 303 of the Labor-Management Relations Act of 1947 "accrues." *Textile Workers Union of America* v. *Lincoln Mills of Alabama*, 353 U.S. 448 (1957).

With respect to tortious conduct, a cause of action generally accrues (commencing the running of the statute of limitations) when the wrongful conduct on the part of a tortfeasor produces an injury or invasion of the personal or property rights of another. Where such injury is the result of a single act, the tort will ordinarily be complete as soon as there has been an invasion of a party's legally protected interest. Under these circumstances, the cause of action immediately accrues and the statute of limitations begins to run. *Momand* v. *Universal Film Exchange Inc.*, 43 F.Supp. 996 (D. C. Mass. 1942). In such a case, characterized by a single violation of a protected right, the plaintiff is entitled to bring suit the moment his interest has been invaded for the recovery of past as well as future damages resulting from the defendant's wrongful act. The concept of the "accrual of a cause of action" initiating the running of a statute of limitations at the moment the wrongdoer's acts result in an injury or invasion of a protected interest is, in this instance, a logical consequence of the purpose of such statutes—the promotion of justice "by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disap-

peared." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342 (1943). However, where, as in the present case, there have been numerous acts on the part of the alleged wrongdoer resulting in a continuous invasion of a protected interest, the question of "accrual" presents a more difficult problem and the courts faced with this question have relied on several different theories in an effort to reach a solution.

An examination of the cases concerned with the problem of the accrual of a cause of action, involving numerous acts resulting in a continuous invasion of a protected interest,[2] leads this Court to conclude that the most appropriate rule for the purposes of this decision is that applied by the Court in *Delta Theaters, Inc.* v. *Paramount Pictures, Inc.*, 158 F.Supp 644 (E.D. La. 1958).[3] The question presented there involved the accrual of a cause of action based upon a conspiracy in violation of Section 4 of the Clayton Act alleged to have continued over a number of years. The Court, recognizing "the conceptual difficulties in attempting to split this type of claim," adopted the rule promulgated by the Third Circuit in *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 Fed. 1 (3rd Cir. 1917), as follows:

> " 'The statute began to run when the cause of action arose, and the cause of action arose when the damage occurred. Then action might have been brought.' In the case of successive damages suffered day by day . . . the statute begins to

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[2]See generally, *Reynolds Metals Company* v. *Yturbide*, 258 F.2d 321 (9th Cir. 1958); *Fowkes* v. *Pennsylvania Railroad Company*, 264 F.2d 397 (3rd Cir. 1959); *Winkler-Koch Engineering Co.* v. *Universal Oil Products Co.*, 100 F.Supp. 15 (S.D. N.Y. 1951); *Sandidge* v. *Rogers*, 167 F.Supp. 553 (S.D. Indiana 1958).

[3]Accord. *Highland Supply Corporation* v. *Reynolds Metals Company*, 327 F.2d 725 (8th Cir. 1964); *Streiffer* v. *Seafarers Sea Chest Corporation*, 162 F.Supp. 602 (E.D. La. 1958); *Radio Corporation of America* v. *Rauland Corporation*, 186 F.Supp. 704 (N.D. Ill. 1956).

> run on each day's damage as it occurs. When suit is brought the plaintiff may recover only for damages inflicted during the period of limitations immediately preceding the filing of the complaint."

This analysis of the accrual problem seems particularly appropriate in an action based on Section 303 of the Act for damages to a plaintiff's "business or property" since, as was pointed out in *Delta Theaters, Inc.* v. *Paramount Pictures, Inc.*, supra, determining the actual cause, and the date thereof, of a particular loss for the purpose of establishing the accrual date of a cause of action would normally be impossible except in simple cases where the "acts are individually related to, and more or less contemporaneous with, the resulting damage". The rule will accordingly be adopted and applied in the instant case.

Appropriate Period of Limitations

Allowing recovery only for damages inflicted within the period of limitations immediately preceding the filing of the complaint, we must now determine, from a study of the law of the state of West Virginia, the appropriate period of limitations for an action based on Section 303 of the Act. The applicable statute (West Virginia Code 55-2-12) was amended in 1959, the effective date of the amendments being June 11, 1959.[4] It is the defendant's

[4]The statute in effect prior to the 1959 amendments provided:

> "Every personal action for which no limitation is otherwise prescribed shall be brought (a) within two years next after the right to bring the same shall have accrued, if it be for a matter of such nature that, in case a party die, it can be brought by or against his representative; and (b) if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued, and not after . . . ."

The amended statute, West Virginia Code 55-2-12, provides:

> "Every personal action for which no limitation is otherwise prescribed shall be brought; (a) Within two years next after the right to bring the same shall have accrued, if it be for

FOOTNOTE—*(continued on next page)*

contention that the effect of this amendment is crucial for the purposes of this decision, since the pre-1959 statute provided a two-year limitation only for those actions "of such nature that, in case a party die, it can be brought by or against his representative." Personal actions which did not survive were limited to a one year period under this statute. The amended statute provides a two-year limitation on personal actions "for damages to property" with no mention of the survival requirement found in the earlier provision. It is the defendant's position that a cause of action for damage to "business" would not have survived under the pre-1959 statute, and, as a consequence, plaintiffs' claim for such losses prior to June 11, 1959 (the effective date of the amended statute) would be barred by the one-year limitation period. However, under the view we take of this question, plaintiffs' cause of action was subject to a two-year limitation period under the statute in effect prior to June 11, 1959, as well as the amended statute. In cases such as the present, where the survival of a federal statutory cause of action is concerned, the question of survival depends not upon the state survival statutes or state decisions relating to the subject, but upon an "interpretation of the statute in the light of the common law." *Barnes Coal Corporation* v. *Retail Coal Merchants Ass'n.*, 128 F.2d 645 (4th Cir. 1942). An interpretation of the cause of action created by the Sherman Act based upon injuries to a person in his *business* or *property* led the Fourth Circuit to conclude in the

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FOOTNOTE—*(Continued from page 8a)*

damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die it could not have been brought at common by or against his personal representative."

Barnes case, supra, that such a cause of action did in fact survive. The federal courts in construing other statutes creating a federal right of action have also been hesitant to allow a plaintiff to go remediless because of the failure of Congress to explicitly provide a right of survival. *Nordquist* v. *United States Trust Co. of New York*, 188 F.2d 776 (2d Cir. 1951); *Van Beeck* v. *Sabine Towing Co.*, 300 U.S. 342 (1937). Indeed, wherever possible the courts have attempted to ameliorate the "extreme harshness of the old common-law rule abating actions on the death of the tortfeasor," (*Cox* v. *Roth*, 348 U.S. 207, 1955) by interpreting the statute ("in light of the common law") by a "liberal interpretation" of the statute creating the right, or by adopting the liberal provisions of a state survival statute.[5] In the light of the Fourth Circuit's opinion in *Barnes Coal Corporation* v. *Retail Coal Merchants Ass'n.*, supra, we do not feel constrained to apply an abatement concept, described as "one of the least rational parts of the law," Pollack, Torts 61 (11th Ed.), to an action under Section 303 of the Labor-Management Relations Act of 1947. Accordingly, we conclude that such an action for injury to "business or property" would survive the death of the plaintiff and would, therefore, qualify under the two-year limitation period of the pre-1959 West Virginia statute of limitations. Thus, the applicable period of limitations with respect to the plaintiffs' claim is two years, and the damages for which they may recover prior to the filing of the complaint are limited to those suffered from June 28, 1959.

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[5]See generally, *Pritchard* v. *Smith*, 289 F.2d 153 (8th Cir. 1961); *Rau's Estate* v. *Commissioner of Internal Revenue*, 301 F.2d 51 (9th Cir. 1962); *Pierce* v. *Allen B. Du Mont Laboratories, Inc.*, 297 F.2d 323 (3rd Cir. 1961); *Kirk* v. *Commissioner of Internal Revenue*, 179 F.2d 619 (1st Cir. 1950); *Lauderdale* v. *Smith*, 186 F. Supp. 958 (E.D. Ark. 1960).

Absence of Any Material Issue of Fact

It is in the light of this limitation upon the period of time within which plaintiffs may recover for damages resulting from an alleged violation of Section 303 of the Act that we now turn to the second contention urged by the defendant in support of his motion for summary judgment—that, conceding that plaintiffs' claim is not entirely barred by the statute of limitations, the record shows an absence of any material issue of fact and defendant is under the applicable principles of substantive law entitled to judgment. As previously noted, this contention is based upon the pleadings, depositions, answers to interrogatories, and affidavits submitted to the Court and made a part of the record herein.

(A) *The Factual Situation:* Chester and Paul Railing were, during the period involved in this dispute, partners doing business under the name of "C & P Coal Company". Plaintiffs' coal mining facilities consisted of strip mining operations on leased property in Taylor and Barbour Counties and a tipple and processing plant near Flemington, in Taylor County. In paragraph six of the complaint, plaintiffs' allege that during April of 1958 and thereafter, defendant United Mine Workers of America, through its officers, agents and members, "induced and encouraged" the employees of plaintiffs to engage in a concerted refusal in the course of their employment "to handle, process, receive, or otherwise work on coal . . . and the objects of the union were to force the plaintiffs to join the union or to cease doing business with other employers, or to cease using, selling, or otherwise handling the products of other employers." In addition to the aforementioned objectives, plaintiffs contend that such "inducement" on the part of the

defendant was for the purpose of forcing "other employers to recognize the union as the bargaining representative of their employees, and to force plaintiffs to recognize the union as the bargaining representative of plaintiffs' employees." It is further alleged that from April of 1958 to July 14, 1959, defendant induced the employees of other employers and other employers "to engage in a concerted refusal, in the course of their employment, to handle, transport, deliver, process, receive or otherwise work on any coal produced by the plaintiffs," the objects being the same as those enumerated in paragraph six of the complaint. The manner in which the alleged inducement on the part of the defendant was conducted is discribed by plaintiffs in their complaint as follows:

> ". . . the union . . . caused high motorcades to be assembled and formed to roam the highways and roads in and around the vicinity of plaintiff's business, and the business of other employers, large mobs were assembled in the vicinity of plaintiff's business and on and about such business area and threatened, abused, intimidated and injured the employees of plaintiff to such an extent that such employees were unable to engage in their employment and plaintiff and employees were prevented from going on and about plaintiff's business area and from operating plaintiff's business . . . employees of plaintiff desiring to work were threatened, beaten, abused, fired upon and so intimidated that they were prevented from working and plaintiff's business and property were greatly damaged . . . Also, other employers seeking to do business with plaintiff were prevented from doing so by such illegal activity on the part of the union."

Defendant, in its answer, denies the preceding allega-

tions and, based upon the pleadings, interrogatories and the responses thereto, and the depositions of plaintiffs, asserts that the undisputed facts demonstrate that the activities complained of were "primary activities" entitling it to judgment as a matter of law.

The facts, not in dispute in the record as presented, may be summarized as follows: In 1958, plaintiffs were running a nonunion mining operation consisting of a strip pit employing twenty to twenty five men, and a tipple employing seven or eight men. Approximately five miles separated these two operations. On the morning of April 3, 1958, Paul Railing arrived at the strip pit to find that the men there employed did not intend to work. Upon inquiry he learned that the "fellows have got union cards, and don't want to go to work." Mr. Railing told the employees to thrash the problem out among themselves, but when only one worker made any move to begin work he sent the men home. Only C & P Coal Company employees were present on this date. The following Monday morning the workers returned to the strip pit. Thirty five or forty other men were also present on that date. These men stood outside the gate leading to the strip pit and though five or six of the employees apparently made a move to enter the premises, they were deterred from so doing by the threats of the other men. No work was performed at the pit that day. Thereafter, picket lines were set up approximately 2,000 feet from the stripping operation on what is known as Buck Run Road, and from April 3, 1958 to July 14, 1959 (when the National Labor Relations Board obtained an injunction prohibiting such activities), all operations ceased at the strip pit as well as the tipple. The pickets ranged in number from 50 to 150 and included most of the employees of C & P

Coal Company. Plaintiffs attempted to haul coal from the strip pit to the tipple on one occasion following the initial setting up of the picket line, however, the pickets blocked the road and the truck was unable to pass. No further attempts were made to transport the coal. Nearly two weeks after the initial work stoppage, officials of the defendant United Mine Workers contacted Chester Railing. A meeting was held at the C & P tipple with Eli Zivkovich, Harry Myers, Joe Gladski and Russell Mayles representing the defendant. The union representatives handed Chester Railing a standard United Mine Workers Contract and told him to sign it. Upon his refusal, he was told that he would either sign the contract or he "would never load another pound of coal." The meeting ended upon this note and no further attempt at negotiation was made between these union representatives and Chester Railing; shortly thereafter, a meeting between Paul Railing, Harry Myers and Eli Zivkovich followed similar lines and produced the same result.

C & P Coal Company sold, through its sales agent, coal other than that which it mined at its own operations. Although the company did not make a practice of buying outside coal, coal was purchased occasionally from several other producers when they had some left over from their own sales, but during the time the activities complained of were being conducted, no such outside coal was purchased.

The picket lines formed on Buck Run Road near the C & P tipple were conducted in a peaceful manner and there is no evidence of violence on the part of any individual except as noted below. These pickets maintained a constant vigil, excepting Sundays and holidays,

until the issuance of the injunction on July 14, 1959. The only instances of actual violence occurred on November 16, 1958 and July 9, 1959. On these two occasions, large pieces of mining machinery belonging to C & P were dynamited and the identity of the guilty person, or persons, was never determined.

(B) *Burden of Proof:* In considering a motion for summary judgment, the moving party (in this case the defendant) has the burden of showing the absence of any genuine issue as to *all* the material facts involved in the asserted claim and made relevant by the applicable principles of substantive law. Although the plaintiffs may have the burden of producing evidence upon a given issue in a trial of the case, on motion for summary judgment the defendant, as moving party, has the burden of producing evidence which negatives the opposing party's claims. 6 Moore, Federal Practice, Sec. 56.15(3) at 2343 (2d 1965); *Stevens* v. *Howard D. Johnson Co.*, 181 F.2d 390 (4th Cir. 1950). In addition, in ruling on a motion for summary judgment the inferences of fact from the evidence offered must be drawn against the moving party and in favor of the party opposing the motion. It is with these principles as a guide that we must now determine whether the defendant in the present case has sustained his two-fold burden of showing that there is no issue of material fact and that he is entitled to judgment as a matter of law.

(C) *Applicable Substantive Principles:* Plaintiffs' complaint has alleged conduct on the part of the defendant which, if proved, would be in violation of Sec. 8(b)(4)(B) of the National Labor Relations Act.[6] Under

[6]The text of Section 8(b)(4), as relevant for the purposes of this decision, is as follows:

FOOTNOTE—*(continued on next page)*

this provision of the Act a labor organization is forbidden to (1) induce or encourage employees to engage in a strike or refusal to handle goods or perform any services, or (2) threaten, coerce, or restrain *any person* (including an employer) where an object of such conduct is either of the following:

(a) Forcing any person to cease dealing in the products or to cease doing business with any other person, or

(b) forcing any other employer to recognize or bargain with a labor organization as the representative of his employees unless such organization has been certified as the representative under the provisions of Section 159 of the Act.

As has been pointed out by the Supreme Court, Section 8(b)(4), properly construed, does not interfere with the ordinary strike, but is directed toward what is known as the secondary boycott "whose 'sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it.'" *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *National Labor Relations Board*, 366 U. S. 667, 672 (1961). This limitation upon

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FOOTNOTE—*(Continued from page 15a)*

"It shall be an unfair labor practice for a labor organization or its agents—(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is— . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees . . . ."

the reach of the language used in Section 8(b)(4) is in "conformity with the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *Labor Board* v. *Denver Bldg. Trades Council,* 341 U. S. 675, 692 (1951). From these broad principles, applicable to cases such as the one with which we are concerned, we must now examine the specific charges as they emerge from the complaint of the plaintiffs.

Inducement of Plaintiffs' Employees

Plaintiffs allege in this complaint that defendant induced and encouraged the employees of C & P to engage in a refusal to "work on coal" at the plaintiffs' strip pit for the purpose of forcing the plaintiffs to cease doing business with other employers and to force other employers to recognize the union as the bargaining representative of their employees. The evidence most strongly relied upon by the defendant in its motion for summary judgment with respect to this alleged inducement of plaintiffs' employees shows (1) the bulk of the activity complained of consisted of picketing near the premises of the employer, and (2) plaintiffs' business with the other named employers was negligible.

If the facts as presented in the record showed simply an attempt to gain recognition of the defendant union as the bargaining agent for the employees of C & P with the incidental *effect* of a cessation of business with other employers, this Court would have little difficulty in granting defendant's motion for summary judgment, See *United Steelworkers of America AFL-CIO* v. *National Labor Relations Board,* 376 U. S. 492 (1964). However,

the record presents a picture, admittedly rather sketchy in certain respects, which indicates that the defendant's activities were not confined solely to the premises of the plaintiffs' operations, but extended to the mining operations of several companies in the area as well as to several trucking concerns. Such a situation presents, especially at this stage in the proceedings, a formidable problem requiring distinctions "more nice than obvious" with respect to the nature and intent of acts performed by or in behalf of the defendant union. Defendant places great emphasis upon the testimony of Chester Railing attributing the refusal of his employees to work simply to the picket line set up on Buck Run Road. Indeed, the evidence does indicate that the refusal to work was primarily the result of this picket line,[7] and if it were shown by the evidence that the dispute in which the union was engaged was a primary dispute with the plaintiffs, such would require this Court to hold, at least with respect to the charge of inducement of plaintiffs' employees, that defendant was in fact entitled to judgment as a matter of law. *Bedford-Nugent Corporation* v. *Chauffeurs, Teamsters and Helpers, Local Union No. 215*, 358 F.2d 21 (7th Cir. 1966); *National Woodwork Manufacturers Association* v. *National Labor Relations Board*, 386 U. S. 612, 626-628, (1967). However, though it is apparent that the activity inducing the conduct complained of occurred near the premises of the plaintiffs, the crucial question concerning the characterization of

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[7]That the inducement complained of did not occur solely at the picket site on Buck Run Road is indicated by the following response to an interrogatory propounded by the defendant:

> "The places were usually around and upon the plaintiffs' tipples and between tipples and strip jobs. However, such threats, abuse, and intimidation (especially to those who had not already knuckled under to defendant's activities) occurred whenever and wherever the defendant's mob come (sic) into contact with such employees."

this dispute as "primary" or "secondary" remains unanswered. To resolve this issue, we are required to examine the relationship of the defendant union to the other employers against whom the activity, with respect to plaintiffs' employees, was alleged to have been directed.[6] A careful examination of the record produces only the most vague outlines of the conduct of the defendant with respect to the other employers in the vicinity and the nature of the dispute among these parties is dealt with only as an aside. The defendant would argue that this absence of evidence is remedied by the showing that the plaintiffs did not in fact conduct business with the other named employers and thus it could not be said that activities inducing plaintiffs' employees to refuse to work had the effect complained of. However, it is undisputed that plaintiffs did purchase coal from other operators and, although the company did not make a practice of buying outside coal, evidence is in the record from which it could be inferred that a business relationship existed between these other coal operators and the plaintiffs. While this Court may not speculate upon the nature and extent of this relationship, we may draw inferences most favorable to the party against whom the motion is made. We accordingly find that plaintiffs have established, for the purposes of this motion, that a business relationship existed between C & P Coal Company and a number of other operators in the area at which the inducement of plaintiffs' employees could have been directed. We are thus once again faced with the question of determining

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[6]The names of the employers with whom plaintiffs were allegedly forced to cease doing business were given as follows: P & J Coal Company; Layman Coal Company; Mildred Coal Company; George Lee Coal Company; Blue Ridge Coal Company; Marra Brothers Coal Company; Kinty Trucking Co.; Kittle Trucking Co.; Dorothy Coal Co.; Gates Trucking Co.; and M & T Coal Co.

whether or not the activity complained of was primary or secondary and, as mentioned above, the determination of such an issue requires evidence establishing the nature of the relationship existing between the union and the other employers. Evidence of this nature is conspicuously absent from the record. While such a failure of proof would, in the case of a trial on the merits, prove fatal to the plaintiffs' claim, upon a motion for summary judgment, wherein the moving party has the burden of producing evidence negating the opposing party's claim, it is the defendant who must bear the consequences of such failure. Accordingly, we hold that, with regard to the issue of the inducement of plaintiffs' employees for the purpose of forcing plaintiffs to cease doing business with other employers and forcing other employers to recognize the union as the bargaining agent of their employees, the defendant has failed to sustain its burden of showing that there is no genuine issue of fact and is not, on the basis of the present state of the record, entitled to summary judgment.

Inducement of Employees of Other Employers

The plaintiffs have alleged in paragraph seven of their complaint that the defendant, through its members, induced the employees of other employers "to engage in a concerted refusal, in the course of their employment, to handle, transport, deliver, process, receive or otherwise work on any coal produced by the plaintiff," the object thereof being to force their employers to cease doing business with plaintiffs and to force plaintiffs to recognize the defendant union as the bargaining representative of their employees. As has already been pointed out in this opinion, the evidence of record with respect to the defendant's activities in relation to the operations of employers other than the plaintiffs is slight if not non-

existent. There is some indication in the record that the employees of the Kittle and Kinty Trucking Companies were persuaded to refuse to transport the coal from plaintiffs' strip pit to the tipple and mention is made, in passing, of a picket line which had formed at "Harry Kaufman's mine." Nevertheless, other than the allegations in the complaint and the answers to the defendant's interrogatories which in substance are in agreement with the complaint, the record is silent. The defendant has had the burden of establishing, on the basis of the pleadings, interrogatories, depositions and affidavits, the absence of any genuine issue of material fact which under the applicable substantive law would entitle it to judgment as a matter of law. As mentioned previously, though the plaintiffs may have the trial burden, on motion for summary judgment the defendant, as the moving party, has the burden of coming forward with credible evidence which establishes the absence of any genuine issue of fact. Suffice it to say, this Court finds that the defendant has failed to sustain its burden with respect to the allegations concerning the inducement of the employees of other employers and that its motion for summary judgment in this regard must, accordingly, be denied.

Inducement of Other Employers

The plaintiffs have alleged in paragraph seven of their complaint that the defendant union "induced . . . other employers to engage in . . . refusal . . . to . . . work on any coal produced by the plaintiffs," the object being to force plaintiffs to recognize defendant union as the bargaining representative of its employees. Prior to the 1959 amendments it had been held that threats made to the *employer* instead of his employees were not unfair labor practices under Section 8(b)(4) of the Act. See

National Labor Relations Board v. *International Union of Brewery Workers*, 272 F.2d 817 (10th Cir. 1959). However, under the 1959 amendments such conduct, for the purpose of the proscribed objectives, is made an unfair labor practice when it amounts to conduct which "threatens, coerces, or restrains any person." It is apparent that the inducement of other employers charged in plaintiffs' complaint was meant to refer to conduct which threatened, coerced or restrained other employers. If only inducement of employers as shown, a claim under Section 8(b)(4)(ii) must fail, for only conduct which amounts to threats, coercion, or restraint is made actionable by that section. *National Labor Relations Board* v. *Servette, Inc.*, 377 U.S. 46, 53-4 (1964). However, for the purposes of this motion for summary judgment we shall consider the complaint as charging conduct which, if proved, would be an unfair labor practice under Section 8(b)(4) of the Act. See 6 Moore, Federal Practice Section 56.10 (2d Ed. 1966). Viewing the complaint in this light and in conjunction with the absence of evidence concerning the conduct of the defendant with respect to the "other employers" mentioned earlier, we hold that the defendant has failed to sustain its burden of showing the absence of a genuine issue of material fact in regard to the charge of coercion of other employers and, therefore, the motion for summary judgment in this respect must be denied.

Summary

To summarize, it is the findings and conclusions of the Court:

(1) That where the statute of limitations is pleaded in an action for damages for the violation of the provisions of Section 303 of the Labor-Management Rel

tions Act of 1947 (29 U.S.C.A. 187), originally brought in the District Court of the United States for the Eastern District of Kentucky and later transferred by that court to the District Court of the United States for the Northern District of West Virginia under 28 U.S.C.A. 1404(a), for the convenience of the parties and witnesses and in the interest of justice, and the Act itself fails to provide a limitation for the bringing of such action, the transferee district court must look to the law of the state of Kentucky, including that state's "borrowing statute," to determine the statute of limitations applicable to the cause of action sued upon.

(2) That while the limitation period itself is controlled by state law, the determination of the time of the "accrual" of the cause of action for the violation of a federally-protected right and the time of the commencement of the running of the state statute with reference thereto are governed by federal decisional law.

(3) That where an action was originally brought in Kentucky and transferred to West Virginia under the doctrine of *forum non conveniens* and it is shown that the cause of action declared upon arose in West Virginia and the period of limitations applicable thereto is shorter in West Virginia than in Kentucky, West Virginia law must be applied by virtue of the force and effect of Kentucky's "borrowing statute" (KRS 413.320).

(4) That the two-year limitation prescribed by West Virginia Code 55-2-12 is applicable to the cause of action declared upon, and any grievance committed or damage sustained more than two years prior to the institution of this action on June 28, 1961 is barred by such statute.

(5) That the defendant has failed to carry its burden of showing a lack of any genuine issue of material fact

with respect (a) to the issue of the unlawful and wrongful "inducement" of plaintiffs' employees; (b) to the issue of the unlawful and wrongful "inducement" of the employees of other employers, and (c) to the issue of the unlawful and wrongful "inducement" of other employers.

Defendant will accordingly have summary judgment against any grievance committed and damage sustained more than two years prior to the institution of this action on June 28, 1961, but defendant's motion in all other respects is denied.

An appropriate order, making this opinion a part of the record, will be submitted within thirty (30) days from the date hereof.

SIDNEY L. CHRISTIE
United States District Judge

Civil Action No. 698-F

Entered June 21, 1968

ORDER

This action came on for hearing upon motion for summary judgment of defendant United Mine Workers of America, and the Court having duly considered said motion for summary judgment, the record herein, including the complaint, defendant's answer and its written motion to amend and supplement said answer, which the Court does sustain, the answer as so amended and supplemented and any and all other pleadings, interrogatories propounded by United Mine Workers of America and the responses thereto filed on behalf of plaintiffs, and the depositions of plaintiffs heretofore taken under date of October 13, 1966 and the exhibits attached there-

to, all of which are ORDERED filed as a part of the record herein, as well as the briefs of counsel for the respective parties; and the Court, being of opinion and so finding and concluding, for reasons set forth in its written Opinion dated October 28, 1967 (which Opinion is ORDERED filed as a part of the record herein), that there is no genuine issue as to any material fact as to the defense of the statute of limitations claimed by defendant, and that as to such defense the Court finds and concludes that:

(1) Where the statute of limitations is pleaded in an action for damages for the violation of the provisions of Section 303 of the Labor-Management Relations Act of 1947 (29 U.S.C.A. 187), originally brought in the District Court of the United States for the Eastern District of Kentucky and later transferred by that court to the District Court of the United States for the Northern District of West Virginia, under 28 U.S.C.A. 1404(a), for the convenience of the parties and witnesses and in the interest of justice, and the Act itself fails to provide a limitation for the bringing of such action, the transferee district court must look to the law of the state of Kentucky, including that state's "borrowing statute," to determine the statute of limitations applicable to the cause of action sued upon;

(2) While the limitation period itself is controlled by state law, the determination of the time of the "accrual" of the cause of action for the violation of a federally-protected right and the time of the commencement of the running of the state statute with reference thereto are governed by federal decisional law;

(3) where an action was originally brought in Kentucky and transferred to West Virginia under the doc-

trine of *forum non conveniens* and it is shown that the cause of action declared upon arose in West Virginia and the period of limitations applicable thereto is shorter in West Virginia than in Kentucky, West Virginia law must be applied by virtue of the force and effect of Kentucky's "borrowing statute" (KRS 413.320); and

(4) the two-year limitation prescribed by West Virginia Code 55-2-12 is applicable to the cause of action declared upon, and any grievance committed or damage sustained more than two years prior to the institution of this action on June 28, 1961, is barred by such statute.

It is therefore ORDERED and ADJUDGED that said motion for summary judgment be, and it is hereby, granted and sustained insofar as said motion pertains to the issue of statute of limitations, and any grievance committed or damages sustained more than two years prior to the institution of this action on June 28, 1961 are barred by West Virginia Code 55-2-12, and finding no just reason for delay, a final judgment of dismissal will accordingly enter, and is hereby entered, as to any grievance committed or damages sustained more than two years prior to the institution of this action on June 28, 1961, pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure, to which finding, conclusion and action of the Court plaintiffs object and except. Defendant United Mine Workers of America objects and excepts to the District Court's action in applying Rule 54(b) in lieu of Section 1292(b) of Title 28, United States Code, to the foregoing ruling.

And the Court being further of opinion and so finding and concluding, for reasons also set forth in its Opinion aforesaid, that the defendant has failed to carry its burden of showing a lack of any genuine issue of material

fact with respect (a) to the issue of the unlawful and wrongful "inducement" of plaintiffs' employees, (b) to the issue of the unlawful and wrongful "inducement" of the employees of other employers, and (c) to the issue of the unlawful and wrongful "inducement" of other employers, and that therefore as to such issues the Court is of opinion to, and it does hereby, deny said motion.

It is therefore ORDERED and ADJUDGED that said motion for summary judgment be, and it is hereby, denied as to each of the foregoing issues (a), (b) and (c), to which finding, conclusion and action of the Court defendant objects and excepts. Thereupon, upon consideration of a motion by defendant, plaintiffs objecting thereto, that defendant be permitted to appeal the foregoing Order set forth in this paragraph, under the provisions of Section 1292(b) of Title 28, United States Code, the Court finds that the foregoing Order is not otherwise appealable under said Section 1292(b) and is of the opinion that said Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal therefrom may materially advance the ultimate termination of the litigation. This statement shall constitute a certificate under said Section 1292(b).

Further proceedings in this cause shall be stayed in this court pending a final determination by the Court of Appeals of each of the foregoing rulings of this Court.

* * * *

SIDNEY L. CHRISTIE
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA AT FAIRMONT

CHESTER RAILING AND PAUL RAILING, d/b/a C & P COAL COMPANY,
Plaintiffs,

Vs.

Civil Action No. 698-F

UNITED MINE WORKERS OF AMERICA,
Defendant.

Entered July 8, 1966

MEMORANDUM AND ORDER

This action is in this court by transfer from the United States District Court for the Eastern District of Kentucky under 28 U.S.C.A. 1404(a) for the convenience of parties and witnesses and in the interest of justice.

There are two aspects to the complaint.

* * * * *

II

The second aspect of the action seeks recovery of both compensatory and punitive damages for non-peaceful, violent, coercive and conspiratorial activities and conduct by the union of such a wilful and wanton nature as to give rise to common-law tort.

The complaint alleges that the plaintiff is a resident and citizen of West Virginia; that the defendant is a resident of Washington, D. C., and that all the activities and misconduct complained of occurred in Taylor, Barbour and Harrison Counties, West Virginia. The action

being initially brought in Kentucky, the plaintiff thus relied upon diversity of parties and requisite amount in controversy to fashion federal jurisdiction for his common-law tort grievance, which would ordinarily be cognizable only in state court.

The union, however, attacks the maintenance of this aspect of the action in this court on the ground of lack of diversity, and has filed an affidavit of its Secretary that many of its members reside in and are citizens of West Virginia. The most recent authority on the point is the case of *Boulingy* v. *United Steelworkers*, 336 F. 2d 160 (4th Cir. 1964), affirmed by the Supreme Court in *United Steelworkers* v. *Boulingy*, 382 U. S. 145 (1965), where it was held that, for diversity purposes, citizenship of an unincorporated labor union is determined by the citizenship of its individual members rather than by the situs of its principal headquarters. But the plaintiff, recognizing the force of these decisions, would nevertheless preserve federal jurisdiction for his state claim by the application of the principle of pendent jurisdiction.

Clearly, standing alone, there is no federal jurisdiction for the common-law tort claim, but it is true, as contended for by the plaintiff, that where federal jurisdiction exists for one purpose, it may, in a proper case, be extended for other purposes so long as they are germane to the federal question. In other words, the plaintiff asserts that, this court has jurisdiction of the action for such relief as may be indicated under Section 303 of the Labor-Management Relations Act, under the doctrine of pendent jurisdiction, it may take jurisdiction of the state claim and adjudicate it as well. Whether this would or would not, be proper in this case does not admit of a resolution at this juncture of the case, as will be seen from a

study of the recent decision of the Supreme Court in *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), handed down since briefs were filed herein. There, Mr. Justice Brennan, speaking for the court, pointed out, first, that the doctrine of pendent jurisdiction is not one of "right" but instead is one of "discretion." Thus, the plaintiff has no *right* to invoke the doctrine; but the court may apply it in a proper case in the exercise of sound discretion. Its justification lies in considerations of "judicial economy, convenience and fairness to litigants," according to Mr. Justice Brennan, and with due regard to comity between state and federal courts. As guidelines, he says that when it

> "(A)ppears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution of state tribunals."

I, of course, cannot determine from the pleadings alone the relative merits of the two-pronged aspects of this case and, consequently, cannot determine at this time which will ultimately predominate; only after submission of plaintiff's proof can such a determination be made. If the proof should show that most of the activities of the union, though an unfair labor practice, were in the main peaceful, but that some of its activities were non-peaceful in nature and effect, I would be prone, in the exercise of discretion, to give recognition to the doctrine of pendent jurisdiction and adjudicate the non-peaceful state claim along with the peaceful federal claim. On the other hand, if the proof should show that non-peaceful activities of the union constituted the bulk or gravaman of the grievances complained of and in-

juries and damages suffered by the plaintiff, and that the damage done by the peaceful unfair labor practices was insubstantial in character and effect, denial of the application of the doctrine of pendent jurisdiction would be called for.

Mr. Justice Brennan also points out that "there may be reasons independent of jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal theories of relief, that would justify separating state and federal claims for trial; if so, jurisdiction here, too, should ordinarily be refused." But aside from such considerations, he reiterates that,

> "Once it appears that a state claim constitutes the real body of a case, to which the federal claim is only an appendage, the state claim may fairly be dismissed."

Order

Therefore, for the reasons above appearing, it is hereby ADJUDGED and ORDERED as follows:

(1) That the motion of the defendant to dismiss the complaint for failure to state a claim on which relief can be granted is OVERRULED;

(2) That the motion of the defendant to quash the summons, service thereof and return of service thereon is overruled as to the federal claim under Section 303 of the Labor-Management Relations Act, and ruling as to the state claim for common-law tort is deferred until trial on the merits, at which time the court will determine whether federal jurisdiction may be extended to the state common-law tort claim under the doctrine of pendent jurisdiction. If the court then rules in favor of pendent jurisdiction, the defendant's motion to quash

will be overruled, otherwise it will be sustained as to the state claim;

(3) That the motion of the defendant to dismiss under Rule 17(b)(3) is OVERRULED as to the federal claim and ruling is deferred as to the state claim, for the same reasons as set forth in "(2)" above;

(4) That a ruling on the motion of the defendant to strike certain allegations of the complaint, particularly paragraphs 10, 11, 12 and 13, thereof, is deferred until trial; and

(5) That the motion of the defendant to dismiss plaintiff's claim for punitive damages as to the federal claim under Section 303 of the Labor-Management Relations Act is SUSTAINED, and as to such damages under the state claim for common-law tort, ruling is deferred until trial.

* * * * *

SIDNEY L. CHRISTIE
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12,723

CHESTER RAILING and PAUL RAILING, d/b/a C & P COAL COMPANY, *Appellants*,

versus

UNITED MINE WORKERS OF AMERICA, *Appellee*.

Appeal from the United States District Court for the Northern District of West Virginia, at Fairmont.
Sidney L. Christie, District Judge.

(Argued March 6, 1969 Decided July 17, 1970.)

Before BOREMAN, CRAVEN and BUTZNER, Circuit Judges.

CRAVEN, *Circuit Judge:*

Chester and Paul Railing began this action on June 28, 1961, for injuries to their business and property alleged to have been caused by unfair labor practices of the officers, agents, representatives and members of the United Mine Workers of America.[1] Jurisdiction rests upon 29 U.S.C. § 187 (1964).

The Railings conducted a nonunion coal strip-mining operation and coal tipple at Berry Run, West Virginia.

[1]The opinion of the district court is reported. Railing v. United Mine Workers, 276 F. Supp. 238 (N.D. W.Va. 1967).

In April of 1958, Railings' employees, allegedly instigated by the Union, struck and picketed these operations. The Union's purpose was said to be: (1) to force the Railings to recognize the Union as exclusive bargaining representative, and (2) to force the Railings to cease doing business with other employers or to cease using, selling or otherwise handling the products of other employers, thereby forcing these other employers to recognize the Union as the bargaining representative of their employees. Additionally, the Railings allege that UMW maliciously destroyed specific items of equipment and property[2] and induced employees of other employers to engage in a concerted refusal to handle or otherwise work on any coal produced by Railing. On July 14, 1959, there was a complete cessation of all strike activity and picketing pursuant to an injunction issued by the National Labor Relations Board; however, the Railings did not institute this action until June 28, 1961, one year and approximately eleven and one-half months after such cessation.

The Railings appeal from the partial grant of UMW's motion for summary judgment as it related to the application of the two-year statute of limitations prescribed by W. Va. Code, ch. 55, art. 2, § 12 (Michie 1966). The district court held that the statute of limitations began to run on the alleged illegal activities of UMW from each day of their occurrence and not from the time when all such activities ceased.[3] The result is to bar many claims that would be viable if the statute of limitations

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[2]Railing requests compensatory and punitive damages for these common-law torts pursuant to the court's pendent jurisdiction.

[3]This decision was determined and declared by the district court to be a final judgment under the provisions of Rule 54(b) of the Federal Rules of Civil Procedure.

were adjudged to run from the date of cessation of illegal activity.

In its discussion of the issue now before us, the district court addressed itself to two basic questions: (1) what period of limitation was to be applied, and (2) when the cause of action being sued upon accrued and when the period of limitations began to run.

Section 303 of the Labor Management Relations Act contains no statute of limitations. The district court referred to state law to determine the pertinent period of limitation to be applied. Plaintiffs originally instituted this action in the District Court for the Eastern District of Kentucky, but the action was transferred to the District Court for the Northern District of West Virginia upon motion of UMW. The court below, the transferee district court, determined that it must look to the law of the State of Kentucky, the State from which the transfer was made, including Kentucky's "borrowing statute," KRS 413.060, to determine the statute of limitations applicable to the cause of action sued upon. See *Cope* v. *Anderson*, 331 U.S. 461 (1947). The Kentucky statute required the application of the West Virginia two-year period of limitation, since it was shorter than the period of limitation prescribed by Kentucky. The Railings do not challenge the correctness of this ruling.

It is the district court's disposition of the problem relating to accrual of the cause of action that is the subject of appeal. In treating this issue of accrual the district court correctly determined that federal and not state law must be applied. *Rawlings* v. *Ray*, 312 U.S. 96 (1941). This is so even though the period of limitation is "borrowed" from the appropriate state. *Cope*

v. *Anderson*, 331 U.S. 461 (1947). Although it is clear that federal law is to be applied, it is not so clear what that law may be. Since neither the statute nor the reported decisions determine when a cause of action accrues under Section 303, we are faced, as was the court below, with the necessity of fashioning a rule of decision to be applied in determining when such cause of action "accrues."

In undertaking to fashion such a rule we have examined cases involving private causes of action arising under the federal antitrust laws. In such cases as *Highland Supply Corp.* v. *Reynolds Metal Co.*, 327 F.2d 725 (8th Cir. 1964); *Crumer Co.* v. *Du Pont*, 223 F.2d 238 (5th Cir. 1955); and *Delta Theaters* v. *Paramount Pictures*, 158 F. Supp. 644 (E.D. La. 1958), it has been held that where private causes of action under the antitrust laws are based upon continuous invasions of one's rights, the causes accrue from day to day as the injured party's rights are invaded and damages result. The Union urges us to adopt the principle of the antitrust cases here.

On the other hand, the Railings contend that under the facts of the instant case, where the same illegal activity continued on a daily basis over a definite period, a cause of action should not be held to accrue and the limitation period should not commence to run until cessation of the acts complained of;[4] that it would be impossible to compute damages on a day-to-day basis, and that the decision of the district court requires of a prospective plaintiff "an attempt at prophecy or projecting

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[4]As one court has colorfully phrased a similar contention: a cause of action does not accrue until "the wicked cease from troubling and the weary are at rest." Crummer Co. v. Du Pont, 223 F.2d 238, 247 (5th Cir. 1955).

into the future how long the alleged illegal activities would continue and what their future effect would be;" that it is unfair to put the injured party in the difficult position of having to protect himself from the running of the statute of limitations while the illegal activities continue.

The district court, in holding that the cause of action accrued from day to day, relied directly on the reasoning of the court in *Delta Theaters* v. *Paramount Pictures*, 158 F. Supp. 644 (E.D. La. 1958). That case involved a suit under the Clayton Act for damages resulting from conspiracy to destroy competition. The conspiracy had allegedly been going on for ten years before the suit was filed. The plaintiff argued that because the actions of the defendants constituted a continuing conspiracy for a single purpose, the applicable statute of limitations should not be construed to run against the plaintiff's single cause of action as long as the conspiracy continued. As the court viewed plaintiff's argument, if the conspiracy constituted a single cause of action, the statute of limitations would either have run from the first "impact" of the conspiracy, in which case the cause of action would have been barred some nine years before, or from the last, which would mean it had not yet accrued. The plaintiff sought to avoid this result by arguing that it should be able to sue on any part of its claim at any time during the conspiracy, but that defendant should not be able to take advantage of the statute until the conspiracy had ceased. The court rejected plaintiff's position, stating that the conceptual difficulties in attempting to split the type of claim involved were not a sufficient reason for refusing to give effect to the principles underlying the statutes of limitation. "The lapse of time obscures

the facts of a continuing conspiracy just as much as those of an intermittent one." 158 F. Supp. at 648.

On its facts, *Delta Theaters* does not reach an unreasonable result. Conspiracy, at best, is an ephemeral concept, and the conspiracy in *Delta Theaters* had allegedly continued over a decade. Certainly the prospect of trying to determine correctly facts spread out over a decade is formidable enough to give pause to any court. The "lapse of time—fading memory—stale claim" arguments underpinning every statute of limitations were, indeed, sufficient reasons for the result the court reached.

But whatever justification existed for applying the day-to-day accrual principle in *Delta Theaters*, we think it does not apply here. The Railings are not charging UMW with conspiracy, but with the virtual destruction of their business through illegal labor activities, including acts of violence. Moreover, the alleged activities continued for only 16 months, from April 1958 to July 14, 1959, and the action was commenced less than two years after the illegal activities ceased. As the Railings point out, the total eventual damage to the business could not be ascertained after each day of illegal activity. Even if all the illegal activity could be broken down into severable, day-to-day "acts," the sum of the damage directly attributable to those acts would likely be less than the total damage resulting from the combination of the acts over 16 months. Thus, for instance, illegal activity during the first month may have caused ascertainable damage at that time, but it may have also caused cumulative damage in the sixteenth month by operating in concert with other illegal activities.

When one views the continuing cause or causes of action in this light, it becomes clear that application of a day-to-day accrual principle is inapposite. Not only would the total damage have been unascertainable before the illegal strike ceased, but also adequate inclusion of all damages resulting from individual, day-to-day acts would have been difficult and cumbersome. To fully protect themselves, plaintiffs would have been forced either to move to amend their complaint frequently to include newly accrued damages, or to speculate as to the total damages that would eventually result from the strike, or both. It would require an unusual degree of prescience to determine when the strike would end and what damage would ultimately result.

Since this is a tort case, it seems to us more sensible to refer to rules of limitation for torts than for antitrust:

> If the continuing nature of the tort and injury is such that damages cannot be determined until cessation of the wrong, the right of action is deemed as continuous as the tort on which it is based so that it accrues at, and limitations begin to run from, the last date rather than from the first date of the wrong, or, as otherwise expressed, limitations do not apply to such a tort so long as it subsists.

54 C.J.S. *Limitations of Actions* § 169 at 128 (1948).

Under the circumstances present here, we think the rule most appropriate is that the cause of action accrues on the last date of continuing illegal conduct for purposes of application of a state statute of limitations, but that for separate injury for which damages are earlier ascertainable suit *may* be brought at the date of ascertainment. In other words, the victim of the illegal activity should be entitled to bring suit as soon

as he can do so, but should not be required to bring suit until the illegal activity has ceased. Cf., *e.g.*, *Urie* v. *Thompson*, 337 U.S. 163 (1949); *Ricciuti* v. *Voltarc Tubes, Inc.*, 277 F.2d 809 (2d Cir. 1960); *Fowkes* v. *Pennsylvania R.R. Co.*, 264 F.2d 397 (3rd Cir. 1959); *Essex Wire Corp.* v. *M. H. Hilt Co.*, 263 F.2d 599 (7th Cir. 1959); *Reynolds Metals Co.* v. *Yturbide*, 258 F.2d 321 (9th Cir. 1958), *cert. denied*, 358 U.S. 840 (1958); *Goodall Co.* v. *Sartin*, 141 F.2d 427 (6th Cir. 1944), *cert. denied*, 323 U.S. 709 (1944). But see, *e.g.*, *R. J. Reynolds Tobacco Co.* v. *Hudson*, 314 F.2d 776 (5th Cir. 1963); *Hilton* v. *Duke Power Co.*, 254 F.2d 118 (4th Cir. 1958), *rehearing denied*, 255 F.2d 840 (1958). Under this rule the West Virginia statute of limitations did not begin to run until the UMW finally ceased its illegal strike activities. We hold the district court erred in ruling that the statute of limitations began to run on the day each unfair labor practice occurred.

The judgment will be reversed and remanded for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

BOREMAN, *Circuit Judge*, dissenting:

It is with some sense of disappointment that I am prompted to file this statement of dissent as to the majority's interpretation and application of the West Virginia statute of limitations.

In the complaint the Railing partnership (hereinafter called plaintiff) invoked the jurisdiction of the court by virtue of § 303 of the Labor Management Relations Act (29 U.S.C. § 187). The plaintiff demanded judgment for damages in separate amounts: (1) for the destruc-

tion of plaintiff's business and the loss of profits therefrom; (2) to plaintiff's physical property, machinery and equipment; (3) for sums expended by plaintiff preparing to resume business operations; and (4) for punitive damages. As the district court noted, there are two aspects to the complaint. In addition to the § 303 claim, the second aspect "of the action seeks recovery of both compensatory and punitive damages for non-peaceful, violent, coercive, and conspiratorial activities and conduct by the union of such a wilful and wanton nature as to give rise to a common-law tort." The court held that, while federal jurisdiction of the § 303 claim was fixed by statute, requisite diversity of citizenship was lacking to invoke jurisdiction of the common-law tort claim although, under the doctrine of pendent jurisdiction the court *might* take jurisdiction and adjudicate the tort claim as well. Citing *United Mine Workers* v. *Gibbs*, 383 U.S. 715 (1966), the district court held that the plaintiff had no *right* to invoke the doctrine of pendent jurisdiction although the court might apply it in the exercise of its *sound discretion*. The court declined to reach a determination on this point until after submission of plaintiff's proof. It was in this posture and context that the court granted defendant's motion for summary judgment as it related to the application of the West Virginia two-year statute of limitations.

The majority takes the view that the pertinent West Virginia statute of limitations did not begin to run until the date of the cessation of strike and picketing activities (July 14, 1959), citing as authority 54 C.J.S., *Limitations of Actions*, § 169, at 128 (1948); but the majority opinion fails to note that text's further comment:

> "Where a continuing tort involves separate and successive injuries, the action accrues at, and limitations begin to run as to each injury from, the date thereof, and *there is not only a cause of action for the original wrong, arising when the wrong is committed, but separate and successive causes of action for the consequential damages arise as and when such damages are from time to time sustained;* and, therefore, as long as the cause of the injury exists and the damages continue to occur, plaintiff is not barred of a recovery for such damages as have accrued within the statutory period before the action. Thus an action may lie for an injury recurring within the prescriptive period, even though the first tortious act antedated such period, and a cause of action based solely on the original wrong may be barred; but the recovery is limited to such damages as accrued within the statutory period before the action." (Emphasis supplied.) § 169, at 128-129.

The district court concluded "the most appropriate rule," in cases concerned with the problem of accrual of a cause of action, involving numerous acts resulting in a continuous invasion of a protected interest, is that applied in *Delta Theaters, Inc. v. Paramount Pictures, Inc.*, 158 F.Supp. 644, 649 (E.D. La. 1958), which although recognizing "conceptual difficulties in attempting to split this type of claim," adopted the Third Circuit's rule in *Bluefields S. S. Co.* v. *United Fruit Co.*, 243 F. 1, 20 (3 Cir. 1917), as follows:

> " 'The statute began to run when the cause of action arose, and the cause of action arose when the damage occurred. Then action might have been brought.'

and, further,

> "In the case of successive damages suffered day by day . . . the statute begins to run on each day's damage as it occurs. When suit is brought, the plaintiff may recover only for damages inflicted during the period of limitations immediately preceding the filing of the complaint."

The court below (276 F.Supp. at 243, n. 3) appropriately cited *Highland Supply Corp.* v. *Reynolds Metals Co.*, 327 F.2d 725 (8 Cir. 1964); *Streiffer* v. *Seafarers Sea Chest Corporation*, 162 F. Supp. 602 (E.D. La. 1958); and *Radio Corporation of America* v. *Rauland Corp.*, 186 F.Supp. 704 (N.D. Ill. 1956). While *Delta Theaters, supra*, involved a cause of action based upon a conspiracy violative of the Clayton Act's § 4 (15 U.S.C. § 15), the court below regarded that analysis "particularly appropriate in an action based on Section 303 of the Act for damages to plaintiff's 'business or property' " since, as the court observed, "determining the actual cause, and the date thereof, of a particular loss for the purpose of establishing the accrual date of a cause of action would normally be impossible except in simple cases where the 'acts are individually related to, and more or less contemporaneous with, the resulting damage.' "

Since the phrase "shall have accrued" is critical in the West Virginia statute of limitations, accrual of a cause of action under West Virginia decisional law becomes a pertinent inquiry.

In *Pickens* v. *Coal River Boom Company*, 66 W. Va. 10, 65 S.E. 865 (1909), the West Virginia Supreme Court held:

> "When the operation of a boom causes deposit of sand in a stream, thereby injuring the grinding capacity of a mill, the mill owner may recover in actions from time to time as damage and loss

> occur, and is not compelled to sue for present and prospective damage in one suit, and the statute of limitations begins to run, not from the construction of the boom, but when the damage occurs in time."

Implementation of *Pickens* came in *Guyan Motors* v. *Williams*, 133 W. Va. 630, 634, 57 S.E.2d 529 (1950), where the West Virginia Court recognized that a right of action accrues to a landowner deprived of a lateral support when damage results from a defendant's act and not when the act takes place if that act does not then damage the land in question.

In *Harrison* v. *McQwen*, 126 W. Va. 933, 938, 30 S.E.2d 740, the West Virginia Supreme Court, recognizing the validity of its rule in *Pickens*, stated "it is perfectly clear that the result of the alleged acts of the defendant did not happen at the actual time of the blast, but . . . when the alleged slide took place. Then the plaintiff owned this land alleged to have been damaged."

The defendant's motion for summary judgment was bottomed upon the complaint, pleadings, interrogatories propounded to the plaintiff by the defendant and plaintiff's responses thereto, as well as depositions of the Railing brothers, Chester and Paul.

Deponent, Chester Railing, testified that the plaintiff's operation had no coal orders or contracts; that plaintiff was dependent for coal orders upon Pursglove Coal Company, its broker, and that it was only when Pursglove called him daily that he knew what the orders were; that plaintiff had no price contract with Pursglove and that he and the broker "would always keep haggling about the price"; that *plaintiff's losses would go from day to day* because of the way in which the plaintiff's operation shipped and sold its coal.

This testimony is contrary to plaintiff's contention that the alleged illegal activity resulted "in irrevocable loss of coal orders and contracts." Even if there had been contracts (and Chester Railing said there were none), plaintiff's argument that "some coal orders and contracts began and ended at one time and other orders and other contracts began and ended on other dates" is consistent with Railing's testimony that losses would go from "day to day" because of the way plaintiff shipped and sold its coal. If, as admitted, losses occurred on a day-to-day basis, there was no necessity for plaintiff to make an "attempt at prophecy or projecting into the future how long the alleged illegal activities would continue." An instant remedy was available when a right of action accrued.

Furthermore, Chester Railing testified that specific items of mining machinery were dynamited and destroyed on the mine property. He fixed the dates of the occurrences. On the night of November 16, 1958, two "P & H Shovels" were destroyed and an "87 Lorraine" shovel was dynamited on July 9, 1959. It is common knowledge in the coal industry and in the areas where coal is mined that stripping shovels are large and expensive items of production equipment. Damages for the destruction of this equipment are sought by plaintiff. Mr. Railing knew of the losses almost immediately after they occurred and it would be senseless to hold that the statute of limitations would not begin to operate as to such losses until the alleged unlawful activities had ceased.

I would affirm that portion of the judgment below which relates to and applies the two-year statute of limitations.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,723

CHESTER RAILING AND PAUL RAILING,
d/b/a C & P COAL COMPANY,
Appellants,

versus

UNITED MINE WORKERS OF AMERICA,
Appellee.

Entered July 17, 1970

JUDGMENT

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed; and the case is remanded to the United States District Court for the Northern District of West Virginia, at Fairmont, for further proceedings not inconsistent with this opinion filed herein.

/s/ SAMUEL W. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 12,723

CHESTER RAILING AND PAUL RAILING,
d/b/a C & P COAL COMPANY,
Appellants,

versus

UNITED MINE WORKERS OF AMERICA,
Appellee.

Entered September 8, 1970

ORDER

It appearing that no member of the court has asked that the court be polled on the suggestion for rehearing en banc, and after consultation with members of the panel on the application for rehearing before the panel, it is now ordered that the petition for rehearing and for rehearing en banc is denied.

It is the opinion of the court that proposed amendments to the pleadings ought be first addressed to the district court, and the application to permit the amendment to be made in this court is denied.

This 8th day of September, 1970.

For the Court:

/s/ J. Braxton Craven, Jr.
United States Circuit Judge

Appendix C

Chapter 2, Acts of the West Virginia Legislature, Regular Session, 1949 (Michie's West Virginia Code, 1955, Chapter 55, Article 2, Section 12, Serial Section 5404):

> "Personal Actions Not Otherwise Provided For. —Every personal action for which no limitation is otherwise prescribed shall be brought (a) within two years next after the right to bring the same shall have accrued, if it be for a matter of such nature that, in case a party die, it can be brought by or against his representative; and (b) if it be for a matter not of such nature, shall be brought within one year next after the right to bring the same shall have accrued, and not after; and (c)

every right of action mentioned above in clause (a) heretofore accrued shall be brought within two years hereafter or within five years from the time such action accrued, whichever shall be less."

Chapter 2, Acts of the West Virginia Legislature, Regular Session, 1959 (Michie's West Virginia Code, Chapter 55, Article 2, Section 12):

"Every personal action for which no limitation is otherwise prescribed shall be brought: (a) Within two years next after the right to bring the same shall have accrued, if it be for damage to property; (b) within two years next after the right to bring the same shall have accrued if it be for damages for personal injuries; and (c) within one year next after the right to bring the same shall have accrued if it be for any other matter of such nature that, in case a party die, it could not have been brought at common law by or against his personal representative."

Rule 56, Federal Rules of Civil Procedure:

* * * * *

"(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

"(c) Motion and Proceedings Thereon. . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

* * * * *